In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 441

CLIFFORD DARRELL ISBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the District of Nevada, petitioner and others were convicted of conspiring to smuggle marihuana into the United States from Mexico, in violation of 21 U.S.C. 176a (C. Tr. 3–7, 197–200).[1] On May 29, 1969, petitioner was sentenced to five years' imprisonment (C. Tr. 234). The court of appeals affirmed (Pet. App.).

In February 1968, one Jack Smith (an informant) and codefendant Pappas purchased 300 kilograms of

[1] "C. Tr." refers to the clerk's transcript, containing the indictment, pleadings, and formal orders. "Tr." refers to the trial transcript, in four volumes. Copies of these documents are being lodged with the Clerk of the Court.

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marihuana in Culiacan, Mexico. Thereafter, Smith returned alone to Las Vegas, Nevada, to arrange to have the marihuana flown to that city. In Las Vegas, he contacted codefendant Green and told him of the purchase in Mexico. Green told Smith that many people were in on the deal and that petitioner had put up the "first money." He stated that the pilot who had been hired to fly the marihuana into this country had not been heard from for some time (2 Tr. 293–301).

The next day, Smith, Green, and petitioner met in the apartment which Green shared with Pappas. Pappas called Green from Mexico and simultaneously spoke with petitioner on an extension phone. On that occasion petitioner asked Pappas when he was going to return. Following the call, he told Green and Smith that he had "a lot of money invested in Nick Pappas" and was "getting tired of this delay." He stated that he was going East in a few days on business and that "when this transaction transpired" the money was to be given to his wife, who would know what it was for and would take care of it. Green told petitioner not to worry; that everything would be all right (2 Tr. 301–304). Subsequently, the marihuana was flown in from Mexico by another pilot (2 Tr. 335–336; 3 Tr. 435–438).

1. Petitioner here contends that Green's statement to Smith that petitioner had put up the "first money" was hearsay evidence and therefore inadmissible (Pet. 7–8). As the opinion below notes (Pet. App. 4), however, that objection was not raised by petitioner when he moved for a mistrial at the time the state-

ment was introduced. Rather, petitioner's sole objection to the statement was then that it antedated the time when, according to the government's bill of particulars, petitioner joined the conspiracy (2 Tr. 300, 350–353). But he was mistaken about the contents of the bill of particulars; it did not state when he joined the conspiracy (C. Tr. 122; cf. 3 Tr. 527–528). The objection, therefore, was properly overruled by the trial court. Even assuming that the motion might have been granted had petitioner objected on the ground that the statement was not made in furtherance of the conspiracy but was merely a recitation of a past fact, and thus did not come within the so-called co-conspirator exception to the hearsay rule (Pet. App. A. 4), petitioner cannot here assert a separate objection that was never raised at trial. Cf. Rule 51, Fed. R. Crim. P.

Moreover, as the court of appeals observed (Pet. App. 4–5), the trial court both during the trial and in its final charge to the jury properly and carefully instructed the jurors that a defendant could not be found a conspirator on the basis of what some other alleged member of the conspiracy might have done or said; such a finding could only be reached from the particular defendant's own statements and conduct (*e.g.*, 1 Tr. 28, 159; 4 Tr. 810). In the face of these "curative instructions" (Pet. App. A. 5), the question of "plain error" under Rule 52(b), Fed. R. Crim. P., does not arise. Indeed, petitioner's own statements following his long-distance telephone conversation with Pappas, the admissibility of which he does not

challenge, indicate clearly that any possible error in the admission of the questioned statement was harmless. Cf. Rule 52(a), Fed. R. Crim. P.

2. There is no substance to petitioner's contention that Smith's testimony as to what he observed and heard in Green's apartment was inadmissible because Smith had on his person at the time a transmitting device by which government agents in an adjacent apartment were able to intercept and record the conversations (Pet. 9–11). Smith was in the apartment on Green's voluntary invitation. Moreover, the recordings were not received in evidence. The Fourth Amendment does not protect a wrongdoer's "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa* v. *United States*, 385 U.S. 293, 302. Cf. *Lewis* v. *United States*, 385 U.S. 206. Since the recordings were not introduced in evidence, the fact that the informer was surreptitiously wearing a transmitting device on the occasions of his visits to the apartment is immaterial. *Hoffa* v. *United States*, *supra*, 385 U.S. at 302–303.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

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